and that he was therefore not entitled to file a caveat. The same view was taken by Neal J. in the other case, although it would appear that his decision turned on the wording of section 63 of the Johore Land Enactment which differs from the equivalent provision in the F.M.S. Land Code in one important respect and that is the provision in section 63 of the said Enactment that every attempt shall be null and void and of no effect.

For the plaintiff it was contended by Mr. Tara Singh that he had an interest in the land arising out of his contract which gave him the right to enter a caveat. He relied on the case of *Chin Cheng Hong* v. *Hameed & Ors.* [1], a Court of Appeal case. In this case both Mathew C.J. and Buhagiar J. held that an agreement to sell land was non-registrable and did not create any interest in the land. The learned Chief Justice found it unnecessary to consider whether such an agreement created a caveatable interest. Buhagiar J. however proceeded to say of such an agreement that:—

> "It passes no actual interest in the land that can be called an equitable estate in the ordinary sense, but an equitable interest of a contractual nature under the instrument consisting of a right to be registered as the owner of the interest purported to be conferred by the instrument (*vide* Hogg, *Registration of Titles to Land*, p. 116). As Lord Dunedin stated in *Haji Abdul Rahman* v. *Mohamed Hassan* [2]: 'The agreement is valueless as a transfer or burdening instrument, but it is good as a contract.' This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the register; the claim to an interest in land arising out of the contract is sufficient to make it a caveatable interest and to support a caveat (*In re Registration of Caveat* [3]). The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in land, but a caveat, being in the nature of a statutory injunction, does not in itself make a claim or right either better or worse."

Wilson J. said he had nothing to add to the judgments of the other two members of the Court. In a subsequent case to which reference has been made, Wilson J. however held there was no caveatable interest under such agreement.

The observation of Buhagiar J. is purely *obiter*, but in Perak Civil Appeal No. 16 of 1959 — *Sellamah d/o Marimuthu* v. *Registrar of Titles*, Perak, (unreported) — Smith J. appeared to have adopted it, when he held that there was no difference between an option to purchase within a certain period and a contract to purchase and that such an option created a caveatable interest.

The cases abovementioned show that there has been a wide divergence of opinion over the years; however, I do not think it is necessary for me to enter the arena in support of one view or the other. In my view, the question before me can be readily answered by determining whether or not a person claiming an interest in a specific portion of a piece of land — assuming without deciding whether his interest is a caveatable interest — is entitled under the Land Code to lodge a caveat over the whole of the land. It is quite clear that in respect of the remaining portion of the land he is not entitled to lodge any caveat whatsoever. I do not think that a caveat is divisible in the same way that certain clauses in a contract may in proper circumstances be severable from the rest. Therefore, if the caveats lodged by the plaintiff were partially invalid such invalidity renders those caveats wholly null and void and of no effect. They should not have been registered in the first place because the Registrar of Titles had no authority outside the four walls of the Land Code. In registering the caveats he was acting in a purely ministerial capacity and the mere fact of registration cannot validate what was invalid.

I accordingly declare the two caveats to be void and of no effect. It follows that the application must be dismissed with costs.

Application dismissed.

Solicitors: *Murphy & Dunbar; Lovelace & Hastings.*

CHIU NANG HONG v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) January 24, 1963]

[K.L. — F.M. Criminal Appeal No. 44 of 1962]

Criminal Law — Rape — Penal Code, s.376 — Consent given by woman — Consent obtained by threat of physical injury — Testimony of woman uncorroborated — Propriety of convicting on such testimony — Nature of warning which judge must direct to himself in such circumstances.

Criminal Evidence — Rape — Uncorroborated testimony — Propriety of convicting on such testimony.

If sexual intercourse with a woman is with her consent but "her consent has been obtained by putting her in fear of death or hurt" then the act amounts to rape.

It is a rule of prudence that in cases of rape it is unsafe to convict on the uncorroborated testimony of the woman. There is no rule of law against a conviction on such evidence, but in every case a caution as to the possible danger of such a course should be administered to the trier of fact. In the case of a jury it must be administered in clear and suitable terms. In the case of a judge the question whether he has administered it to himself or not is to be decided on an examination of his approach to the question as a whole.

Observations on judicial powers.

COURT OF APPEAL (CRIMINAL).

R. Ramani (*M. S. Naidu* with him) for the appellant.

H. S. Ong (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Thomson C.J.: This appellant was convicted before Ong J. for rape in contravention of section 376 of the Penal Code and sentenced to eighteen months' imprisonment. Against that conviction and sentence he has now appealed.

The appellant is a piano dealer and the prosecutrix is a married woman, aged 28, who has been married for 9 years and has 3 children.

At this stage it is not in question, and at the trial it was admitted, that during the morning of 10th May, 1962, at premises in Lorong

Parry, Kuala Lumpur, the appellant had sexual intercourse with the prosecutrix.

It was the case for the prosecution that although the prosecutrix consented to the act of intercourse her consent was obtained by the appellant putting her in fear of death or hurt and therefore what he did amounted to rape within the meaning of the third paragraph of section 375 of the Penal Code which makes it clear in terms that sexual intercourse with a woman with her consent is still rape when "her consent has been obtained by putting her in fear of death or hurt."

The defence was that there was no question of putting her in fear and that her consent was freely given.

Briefly, the story of the prosecutrix was that in company with her husband she met the appellant for the first time on 4th May, 1962, at a party where there was drinking and dancing. She met him, again in the company of her husband, at a similar party on the night of 9th May. The following morning she accompanied her husband, who was apparently suffering from having taken too much alcohol the previous night, to his place of employment. She then went on to a dancing school where she had been taking lessons for some time. She said the appellant was aware that she took dancing lessons at this school because the subject had been discussed in the course of conversation in his hearing at one of the parties. While she was there the appellant rang her up and said her husband was with him and was not feeling well and had asked him (the appellant) to fetch her. She agreed to this and shortly after the appellant arrived at the dancing school in a labelled trade van which he used for his piano business. She went with him in this vehicle and was driven to a house which is apparently some sort of a private brothel in a secluded part of the suburbs of Kuala Lumpur. The appellant said her husband was there and invited her to enter. When she did so he pushed her into a room and secured the door. He told her not to shout and putting his hands over her neck said if she shouted he would strangle her. She was shocked and because of his size did not dare to put up a fight. She was so frightened that she just stood still in the middle of the room. The appellant then took off her clothes, carried her to the bed and had sexual intercourse with her.

Afterwards he took her to his van and drove her home to her house in Petaling Jaya. The following night, that is the night of 11th May, she told her husband what had happened. Her husband told her it was up to her to decide whether she would make a report to the Police. She decided she would make a report to the Police and she did so the next morning.

The appellant's story was that at the party on 4th May and to a greater degree at the party on 9th May the prosecutrix showed signs of affection for him by dancing with him in improper and suggestive proximity. At the end of the second party her husband was too drunk to drive himself home so the prosecutrix did so but before leaving she whispered to him a request that he should ring her up at her dancing school the following morning.

The following morning her husband rang up to thank him for the party. He said he had a headache and the appellant advised him to take some brandy and have a rest. That reminded him that he had promised to ring up the prosecutrix. He did so and she asked him to go to the dancing school. He went there and after some conversation they left and she said she wanted to go to somewhere quiet. He then took her to the premises in Lorong Parry, with which he was familiar. He took her in and after some preliminary approaches which were entirely amicable he removed her clothes with her assistance and had connection with her with her consent. He then took her home in his van. While doing so there was some conversation about letting her have a piano cheap. At no time did he offer any explanation as to why, if his story was true, the prosecutrix should have commenced proceedings against him beyond saying that women are fickle.

There was a considerable amount of evidence as to what happened at the two parties on 4th and 9th May and as to events subsequent to the alleged rape. At this stage most of that evidence has ceased to be of any great probative value because most of it goes little way in assisting to answer the questions really in issue as these questions formulated themselves in the course of the trial. Accordingly it does not require to be mentioned here except perhaps the medical evidence. The prosecutrix was examined on 13th May by a woman doctor who found no traces of any injury either externally or in the vulva. But of course that evidence was of little importance because it was no part of the prosecution case that the prosecutrix had been forced in any way. Again a gynaecologist called for the defence who had not examined the prosecutrix expressed the view based on what he had heard that if at the material time the prosecutrix was in a state of shock as a result of threats by the appellant it was unlikely that she would have been able to give a very detailed account of what had taken place. As she was able to give a detailed account of what had taken place it was unlikely that she was in any great degree of shock and her narration showed that she was in full possession of her senses. He was not examined however as to the possible effects on her powers of recollection of the questioning she must have undergone on more than one occasion between the incident and the trial.

At the close of the trial it became clear that there were only two questions to be decided. The first was whether or not the Court was satisfied that on the night of 9th May the prosecutrix asked the appellant to ring her up at the dancing school the following morning. That question was

of importance by reason of its bearing on the second question which was the crucial question in the whole case. That was whether or not the Court was satisfied that the appellant obtained the consent of the prosecutrix to his having connection with her by putting her in fear of death or hurt. There was no question of identity because identity was admitted. There was no question as to whether sexual intercourse had taken place because sexual intercourse was admitted. There was no question of want of consent because there was consent. The question was as to how the consent was obtained.

The trial Judge fully appreciated the questions he had to decide and in the event he answered both these questions in a sense unfavourable to the appellant and accordingly he found the appellant guilty. He clearly approached the matter with very great anxiety and he has since stated in very great detail the grounds on which he convicted the appellant. Before us these grounds have been criticised and we have considered them almost sentence by sentence. Perhaps, however, it is necessary to add that having considered them sentence by sentence we have then gone on to consider them as a whole.

Having done so we are forced to the conclusion that the trial Judge was overwhelmingly influenced by the impression, admittedly a subjective impression, which he formed of the credibility of the prosecutrix and that compelled him to accept her evidence as evidence of truth even after the most meticulous examination of every piece of the prosecution evidence and of the evidence of the appellant and of the defence witnesses.

That being so it is difficult to see any ground on which this Court can interfere. Reading the notes of evidence in cold print it may well be that in our own minds we might feel something less than satisfaction as to the guilt of the appellant. Nevertheless we must remember that we have had no opportunity of observing the appellant; we have had no opportunity of observing the prosecutrix. The trial Judge, who is a very experienced Judge, has had these opportunities and in that connection it must be remembered that he, unlike ourselves and unlike counsel for the appellant, is of the same race as the parties. In the circumstances unless we were satisfied there had been a miscarriage of justice (and we are not so satisfied) it would be wrong for us to interfere.

It is true, and this is one of the main grounds on which the conviction has been attacked, to say that it is a rule of prudence that in cases of this nature it is unsafe to convict on the uncorroborated testimony of the woman and that although there is no rule of law against a conviction on such evidence nevertheless in every case a caution as to the possible danger of such a course should be administered to the trier of fact. In the case of a trial by jury this Court looks at the Judge's charge to the jury and if we find no such warning we say there is misdirection. Similarly, in a case where the Judge himself is the trier of fact, if this Court were satisfied that the Judge had not administered to himself such a warning we would hold he had misdirected himself just as if he had misdirected a jury. There is, however, this difference. A jury cannot be expected to be aware of the need for such a warning by the light of nature and it must be administered to them in clear and suitable terms. A Judge, however, can be expected to be aware of it and whether or not he has administered a suitable warning to himself is not to be determined on the inclusion or omission of some particular formula in his grounds of judgment but on an examination of his approach to the question as a whole.

In that light we have examined the grounds of judgment of Ong J. in the present case and it is abundantly clear that he had such a warning before him from beginning to end. It is clear that he was well aware that the only evidence to support a conviction was the uncorroborated evidence of the prosecutrix. It is clear that he examined the rest of the evidence to find if there was such corroboration and that he did so because he recognised the wisdom of having it. And it is clear that he did not find such corroboration, that he was aware he had not found it and nevertheless with his eyes open he felt himself unable to resist the compulsion to accept the prosecutrix's evidence as true.

It was urged before us that the prosecutrix's story was lacking in probability and, in particular, that her explanation as to why she delayed telling her husband what happened until 36 hours later was particularly improbable. But again it is clear that the trial Judge had considered all that and yet in spite of it he felt himself compelled to convict.

After the most careful consideration we find ourselves compelled in all the circumstances of the case to dismiss the appeal.

In every system of administration of law more advanced than the exercise of tribal justice by the assembly of the tribe there must be some organ of society to whom society delegates its powers of deciding such matters as the guilt of offenders. That is the Judge. In our view there is much wisdom in the aphorism *"Optima est lex, quae minimum relinquit arbitrio judicis"*. So far as we are concerned, however, it is not for us to criticise the limits which the law imposes on the judicial power, it is our duty to accept them and if necessary to interpret them.

And, so long as the authority to which that power is delegated keeps within these limits and observes the rules appointed by the law for the exercise of that power then his decision must be accepted. We know of no case that would justify us in interfering with the findings of a trial Judge on a question of fact which are based entirely on the assessment of credibility which ignore no relevant fact, which take into no account no fact that is irrelevant and where there has been no substantial contravention of any rule of law or judicial procedure.

As regards sentence, rape is a serious offence and we cannot regard the sentence imposed in this case as in any way excessive.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Braddell & Ramani.*

PUBLIC PROSECUTOR v. CHI AH KOW & ORS.

[A. Cr. J. (Adams J.) June 18, 1962]

[Johore Bahru — Criminal Appeal No. 6 of 1962]

Customs Ordinance, 1952, s.131(1)(e) and (iii) — Prohibition of imports — Importation of South African goods — Customs (Prohibition of Imports) Order, 1960.

Evidence — Prohibited goods — Articles labelled "product of South West Africa" — Whether this is prima facie evidence of origin — Evidence Ordinance, 1950, s.106.

The respondents were charged under section 131(1)(e) of the Customs Ordinance, 1952 for knowingly conveying in a motor lorry 141,200 packets of firecrackers, 400 lbs. of saccharine and 400 dozen tins of sardines manufactured in the Union of South Africa. The first and 3rd respondents were convicted on the first and second charges and were acquitted without their defence being called on the third charge. The second accused was acquitted of all three charges. The Public Prosecutor appealed against the acquittal of the second respondent on all the three charges and against the acquittal of the 1st and 2nd respondents on the third charge. He also appealed against the sentence imposed on the 3rd respondent because he had a previous conviction under the Customs Ordinance. It was argued for the prosecution that (i) explanation of the 2nd respondent that he was merely a lorry attendant and only carried out the duties as such attendant was highly unreasonable, (ii) the acquittal of the 1st and 3rd respondents in respect of the 400 dozen tins of sardines was wrong because they were labelled to be a product of South West Africa and therefore prohibited under the Customs (Prohibition of Imports) Order, 1960.

Held: (1) on consideration of all the evidence in this case the explanation of the second accused was reasonable under the circumstances;

(2) if an article is labelled as in this case that it is a product of South West Africa then that is *prima facie* evidence that it is a product of South West Africa.

Per curiam: ".....Any South African goods in the country are prohibited goods, and that they became so at the date of the coming into force of the Order, and if the owner of those goods wants to claim the protection of paragraph 2(1) then under the normal provisions of law contained in section 106 of the Evidence Ordinance, the onus is on the owner to show that he is entitled to take advantage of that privilege or exemption."

Cases referred to:—

(1) *Chee Shih Kwang* v. *Public Prosecutor* [1955] M.L.J. 127.

(2) *Saminathan* v. *Public Prosecutor* [1955] M.L.J. 121.

(3) *Quek Thiam Ting & Anor.* v. *Rex* [1947] M.L.J. 27.

(4) *Ng Kim Huat* v. *Public Prosecutor* [1961] M.L.J. 308.

MAGISTRATE'S CRIMINAL APPEAL.

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the appellant.

Omar bin Saleh for the 2nd respondent.

1st and 3rd respondents in person.

Cur. Adv. Vult.

Adams J.: The respondents in this appeal are Chi Ah Kow, Loo Eng Hock and Kamoo bin Alladin. All three respondents were charged in the Sessions Court, Johore Bahru, as follows:—

"**1st charge:**

That you, (1) Chi Ah Kow, (2) Loo Eng Hock and (3) Kamoo bin Alladin at about 5.00 a.m. on 4.11.61, at the 14th mile Gelang Patah Road, Johore, were knowingly concerned in conveying in Motor Lorry No: NA 4079 prohibited goods, to wit 74 gunny sacks containing 141,200 packets Firecrackers, valued at $8,472 with intent to evade the prohibition order (L.N. 624 dated 26.10.54 — Customs (Prohibition of Imports) Order, 1954) applicable to such goods, contrary to section 131(1)(e) and punishable under section 131(1)(iii) of the Customs Ordinance, 1952.

2nd charge:

That you, (1) Chi Ah Kow, (2) Loo Eng Hock and (3) Kamoo bin Alladin at the same time, date and place, were knowingly concerned in conveying in Motor Lorry No: NA 4079 prohibited goods, to wit 4 cases containing 400 x 1 lb. plastic bags saccharine, valued at $1,600 with intent to evade the prohibition order (L.N. 477 dated 13.7.54 — Sales of Food and Drugs (Amendment) Regulation, 1954) applicable to such goods, contrary to section 131(1)(e) and punishable under section 131(1)(iii) of the Customs Ordinance, 1952.

3rd charge:

That you, (1) Chi Ah Kow, (2) Loo Eng Hock and (3) Kamoo bin Alladin at the same time, date and place, were knowingly concerned in conveying in Motor Lorry No: NA 4079 prohibited goods, to wit 100 cartons containing 400 dozen tins sardines manufactured in the Union of South Africa valued at $2,400 with intent to evade the prohibition order (L.N. 161 dated 12.7.60 — Customs (Prohibition of Imports) Order, 1960) applicable to such goods, contrary to section 131(1)(e) and punishable under section 131(1)(iii) of the Customs Ordinance, 1952."

The first and the third respondents were convicted on the first and second charges and were acquitted without their defence being called on the third charge. The second accused was acquitted on all three charges. The Public Prosecutor has appealed against the acquittal of the second respondent on all the charges and against the acquittal of the 1st and third respondents without their defence being called on the third charge. He also appeals against the sentence imposed upon the third respondent because he had been previously convicted of an offence against the Customs Ordinance. It will be noticed in passing that the 1st and 3rd respondents did not appeal against their convictions on the first